70-91

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

[redacted]

JOSEPH PARISI,

Petitioner,

vs.

MAJOR GENERAL PHILLIP B. DAVIDSON, Commanding General, United States Army Training Center, Fort Ord, California; CAPTAIN COUGHLIN, Commanding Officer, Hospital Company, United States Army Training Center, Fort Ord, California; STANLEY RESOR, Secretary of the Army,

Respondents.

BRIEF OF PETITIONER

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INTRODUCTION

Petitioner, Joseph Parisi, challenges the decision below that he must exhaust military judicial remedies, including appeals, before seeking review in the federal district court of administrative denial of his application for discharge from the military as a conscientious objector. Petitioner respectfully submits that such decision represents an unprecedented extension of the doctrine of exhaustion of remedies and is not supported by the policies underlying the exhaustion doctrine nor by the traditional reluctance of civilian courts to become involved in military affairs. Equally significant, the effect of this decision is to require Parisi and numerous other in-service conscientious objectors either to comply with orders which violate their

religious scruples or be deprived of access to federal courts to secure relief from infringement of Constitutional rights. Such a result conflicts both with settled principles of exhaustion and with the overriding Congressional and Administrative policy that "has deemed it more essential to respect a man's religious beliefs than to force him to serve in the Armed Forces . . .." Department of Defense Directive 1300.6, Par. IV A. For these reasons, petitioner urges this Court to reverse the decision below and order the case to proceed on the merits in the district court.

CITATIONS TO OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 435 F.2d 299 (9th Cir. 1970). The

earlier order of the district court staying proceedings has not been reported but is included as a portion of the Appendix herein at pages 52-55.

JURISDICTION

The opinion and order sought to be reviewed was entered on December 3, 1970 in Action No. 25773 in the United States Court of Appeals for the 9th Circuit. A Petition for Writ of Certiorari was filed in this Court on February 27, 1971 and the Petition was granted by Order entered May 3, 1971. Jurisdiction in the United States Supreme Court is asserted pursuant to the provisions of 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where a member of the Armed Forces applies to the federal district court for a writ of habeas

corpus on the ground that his application for discharge as a conscientious objector has been wrongfully denied without basis in fact, and is thereafter charged by military authorities with refusing to obey an order, is it proper for the federal district court to stay the habeas corpus action pending exhaustion of military judicial remedies, including appeals?

STATUTES AND REGULATIONS INVOLVED

The applicable statute is 28 U.S.C. § 2241(a). It provides in pertinent part as follows:

> "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . . ."

The applicable regulations are Department of Defense Directive 1300.6 and Army Regulation 635-20 which provide for discharge of a member of the Army on the ground of conscientious objection unless the

application is based solely on conscientious objection which existed but was not claimed prior to induction.

STATEMENT OF FACTS RELEVANT TO THE ISSUE PRESENTED FOR REVIEW

Petitioner is a candidate for discharge from the military as a conscientious objector. He filed this action in the United States District Court for the Northern District of California seeking a writ of habeas corpus in accordance with the numerous decisions holding that denial of such a discharge "without basis in fact" constitutes deprivation of due process.[1/] The instant appeal, however, does not

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1/ See, e.g., Hammond v. Lenfest, 398 F.2d 705 (2nd Cir. 1968); Brown v. McNamara, 387 F.2d 150 (3d Cir. 1967); Cooper v. Barker, 291 F. Supp. 952 (D. Md. 1968); Crane v. Hedrick, 284 F. Supp. 250 (N. D. Cal. 1968).

reach the merits of petitioner's claim -- which are indisputably strong.[2] Rather, petitioner here contests an order entered in the district court and affirmed by the

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2/ It is one of the particular ironies of this proceeding that, with the exception of the Army reviewing officials in Washington, D. C., no one familiar with petitioner or his claim for discharge has disputed the sincerity of Parisi's discharge request, or the depth of his beliefs. (See infra at 10-11). Indeed, the strength of petitioner's claim on the merits was commented upon in dicta by the court below (App. 71) -- although the effect of that court's holding was to deprive him of the right to prosecute that claim for a substantial period of time.

Court of Appeals, staying the civil action on the ground that petitioner was first required to exhaust military judicial remedies, including appeals. Petitioner contends that such requirement was unwarranted and constituted error.

As respects the question of exhaustion now before the Court, as well as on the merits, these proceedings present an unusually compelling case for relief. Petitioner was drafted on August 22, 1968. Thereafter, on May 22, 1969, he filed an application for discharge as a conscientious objector pursuant to the provisions of Army Regulation (A.R.) 635-20 and

Department of Defense Directive (D.O.D.) 1300.6.[3/] At the time of this filing, petitioner was stationed at Fort Ord, California and had received no orders for overseas duty. In brief, petitioner's application described his strong religious background and training in the Roman Catholic faith as well as the practical application of his beliefs and training as a social worker in urban ghettos. At the time he was drafted, petitioner

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3/ A.R. 635-20 and D.O.D. 1300.6 provide for the discharge of so-called "in service" conscientious objectors on standards essentially equivalent to those applied to Selective Service registrants generally with the exception that an applicant for discharge from the military may not base his claim solely upon conscientious objection which existed but was not claimed prior to induction.

admittedly had doubts about, but was not conscientiously opposed to, active military service. However, as a result of experiences in basic training (and from extensive bible study and religious discussion with other soldiers) he became firmly convinced that his continued participation in the military in any form was inconsistent with his religious beliefs. 4/

4/ Parisi's application stated in part: "As a Christian, I cannot conscientiously kill or ~~harm another person nor support~~ killing in any way or form. It was intended that Christians practice living as Jesus lived. It is clear that as a Christian and a human being, I believe strongly enough in these ideals of love and peace that a Christian community will ultimately be a reality and the word of God prevail. If this is to become reality, I cannot continue to engage myself in actions which I desire to bring

Petitioner's discharge application was processed in accordance with the requirements of A.R. 635-20 and was submitted to the Army's reviewing officials in Washington, D.C., with the emphatic and unanimous endorsements of the Base chaplain and psychiatrist as well as Parisi's commanding officer and the Army's independent

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4/ (continued) an end to. I must serve mankind in a manner by which no man shall suffer or be harmed through my actions. Man was not created with the intention that he would eventually destroy himself. Because man must prevail, it is my duty to object to the violence of war. It is only by acting in this way that war shall end. It is the duty of the Christian to be first to engage himself in opposition to war. Ultimately, this shall stimulate a universal movement for peace in the name of humanity and the gospel."

Hearing Officer who extensively interviewed petitioner.[5/] However, despite this strong showing, Parisi's application was disapproved by the Army in November, 1969, on the asserted grounds (a) that his beliefs had become "fixed prior to entering the service" and (b) that he was not "truly" opposed to all war by reason of his religious beliefs.

5/ In passing upon Parisi's request for discharge, the Base Chaplain concluded: "There is no question whatever as to the sincerity of the applicant as regards his conscientious objection," and that "his convictions are firm and resolute, nutured in much genuine soul searching." Similarly, the Base psychiatrist reported that "there is no doubt as to his sincerity in this matter," -- a general conclusion shared by the Army's own Hearing Officer who, after an extended interview, recommended approval of petitioner's discharge request.

Promptly following this denial, Parisi filed a request for review by the Army Board for the Correction of Military Records and, while this request was pending, also filed a petition in the United States District Court seeking a writ of habeas corpus. As noted above, Parisi's habeas petition alleged that he had been denied discharge as a conscientious objector without basis in fact and had thus been deprived of due process under the Fifth Amendment.

On the date of filing (and following hearing) the court ordered the habeas corpus proceedings stayed pending review and action by the ABCMR. However, the court retained jurisdiction of the action and entered a limited protective order restraining the Army from

assigning Parisi to duties involving "materially greater" participation in combat related activities pending further court action. 6/

6/ Although entering the limited restraining order described in text above, the district court declined to enter a requested injunction restraining respondents from transferring petitioner out of the Northern District of California pending disposition of his habeas petition. On December 4, 1969, therefore, Parisi filed an initial appeal in the Court of Appeals for the Ninth Circuit seeking review of the Order denying the injunction against transfer.

At about this same time, Parisi received from the Arny the transfer of duty order discussed hereafter in text. He then sought, first from the Court of Appeals, then from Circuit Justice Douglas, an order staying his deployment pending disposition of the pending appeal. These stay applications were denied, respectively, on December 10, 1969 and December 29, 1969.

The earlier appeal in the

Subsequent to the entry of this stay order in the district court, but before any action had been taken by the ABCMR, Parisi received orders which, in essence, provided for his transfer to Viet Nam. Pursuant to these orders, he reported to Fort Lewis, Washington on December 31, 1969, and was there booked for immediate overseas deployment. Parisi, however, firmly believed that such transfer would seriously violate his religious

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6/ (continued) Ninth Circuit was subsequently dismissed (March 17, 1970) as moot upon the suggestion of petitioner, following ruling by the ABCMR and entry of an Order to Show Cause by the district court in the habeas corpus action.

beliefs.[7/] He therefore refused to obey the order to board the plane for Viet Nam and was immediately placed in the stockade and charged with violation of Article 90 of the Uniform Code of Military Justice (refusal to obey a lawful order).

7/ As stated in Parisi's affidavit in the district court, for him, the duties in Viet Nam involved far more serious violation of his religious beliefs. This was because the psychological counseling there would involve direct participation in and supporting of combat activities and helping to prepare soldiers for battle. He could also be required at any time to participate directly in combat and the carrying of weapons. The credibility of these beliefs is borne out, we suggest by the following excerpt from an article in Newsweek magazine discussing the My Lai affair:

> "When you're in Viet Nam, there is a shift in your thinking away from humanitarian values to simply doing a job," says Dr. Albert Kast, a 30-year old clinical psychologist in San Francisco who spent a year

On March 2, 1970 -- before the military court had been convened to hear the criminal charges against Parisi -- the ABCMR notified petitioner that it had rejected his application for relief. Promptly thereafter, the district court issued an order to show cause in the pending habeas corpus proceedings. In its return, however, the government moved to stay the civil action pending exhaustion of petitioner's military judicial remedies arising out of the then-pending court martial.

7/ (continued)

in Viet Nam. / "Our job was getting disturbed people back into combat so they could kill more people. And we did our job very well." (Newsweek, December 8, 1969, p.35).

On March 31, 1970, the district court granted respondent's renewed stay-motion but certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). In the interim between that stay order and the order of the Ninth Circuit Court of Appeals accepting petitioner's § 1292(b) appeal (April 24, 1970), Parisi was court martialed and convicted of the charge against him.[8/] He was sentenced

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8/ As a defense to his court martial, petitioner asserted, inter alia, that the Army had denied his application for discharge from the Army without basis in fact. This defense was asserted pursuant to the apparent holding by the Court of Military Appeals in United States v. Noyd, 18 USCMA 483, 40 CMR 195 (1969) that where conscientious objector discharge is "illegally" refused an order "generated" by such "decision" is "also illegal." But see United States v. Stewart, 20 USMA 272, 43 CMR 112 (1971) and compare U. S. v. Wilson,

to two years hard labor with a dishonorable discharge. His appeal from that conviction before the Court of Military Review is now pending.

On December 3, 1970, the Court of Appeals affirmed the district court's stay order and on May 3, 1971, this Court granted Parisi's petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals.

8/ (continued) 2 S.S.L.R. 3548 (U.S.C.M.A. 1969).

Passing upon such defense at trial the Military Judge did not strictly purport to pass upon whether there had been a "basis in fact" for the Secretary's administrative denial, but did review Parisi's file to determine whether such action was "arbitrary", "or capricious," constituting an abuse of discretion. See Appendix at 89-91. The judge concluded that no such abuse had been shown. What legal conclusion would have followed had his conclusion been contrary does not appear from the military trial record -- nor is it clear from the decided cases. See the decisions cited above as well and at pages 24-30, infra.

SUMMARY OF ARGUMENT

Petitioner contends that the court below improperly extended the doctrine of exhaustion of remedies in its requirement that he pursue military judicial remedies (including appeals) from his court martial conviction prior to seeking habeas corpus relief in the Federal District Court. Petitioner submits that an analysis of the exhaustion doctrine focusing in particular upon the considerations deemed important by this Court in McKart v. United States, 395 U.S. 185 (1969), together with an analysis of the particular administrative procedures designed by the military for processing servicemen's applications for discharge as conscientious objectors, demonstrates that those administrative procedures, and no other procedures,

should be exhausted as a precondition to seeking habeas corpus relief in the Federal District Court. Petitioner further contends that principles of comity between Federal and Military Courts cannot justify invoking the pendency of Court Martial proceedings to thwart the wholly independent right of a conscientious objector to obtain Federal Court relief if his discharge application was denied without basis in fact and thus in violation of due process.

Moreover, the decision below is premised on an assumption, not borne out by reported decisions of the military courts, that the relief which petitioner seeks in the Federal District Court -- discharge as a conscientious objector -- is equally available to him through the judicial remedies which he is being forced to pursue in the military.

Petitioner will demonstrate, however, that the availability of such relief is either nonexistent or extremely remote and in any event subject to inordinate delay, and surely cannot constitute an adequate remedy within exhaustion principles.

Petitioner also contends that the decision below has improperly denied him access to federal courts, and has infringed the basic policies underlying exemption for conscientious objection. Petitioner will demonstrate that the effect of the decision below is to make access to the federal courts on habeas corpus conditioned upon the willingness of a conscientious objector discharge applicant to violate his professed beliefs. Where, as here, the soldier seeking relief in the Federal District Court has exhaused the Army administrative procedures specifically designed to deal with applications such as

his, the government has no legitimate interest, petitioner submits, in requiring that additional "remedies" be pursued.

ARGUMENT

THE DOCTRINE OF EXHAUSTION OF REMEDIES DOES NOT PROPERLY REQUIRE AN APPLICANT FOR CONSCIENTIOUS OBJECTOR DISCHARGE FROM THE ARMY TO EXHAUST MILITARY JUDICIAL REMEDIES PRIOR TO SEEKING HABEAS CORPUS RELIEF IN A UNITED STATES DISTRICT COURT, SINCE SUCH JUDICIAL REMEDIES ARE NEITHER DESIGNED NOR INTENDED TO PROVIDE THE TYPE OF RELIEF SOUGHT THROUGH THE ADMINISTRATIVE PROCESS AND REQUIRING SUCH EXHAUSTION WOULD DEPRIVE DISCHARGE APPLICANTS OF ACCESS TO THE FEDERAL COURTS.

This appeal raises important, and unresolved, questions bearing upon the doctrine of exhaustion of remedies and the relation between religious freedom and access to the federal courts, questions which are unresolved by the decisions of lower federal courts. 9/

9/ Although the issue presented here has not previously been determined by this Court, it has been seemingly presented but not reached in Noyd v. Bond, 395 U.S. 683, 685 (n.1) and Craycroft v. Ferrall, 397 U.S. 335 (1970) vacating and remanding 25 L. Ed 2d 351 (1970). Similarly, the question of exhaustion of remedies in the context here presented has been an issue of recurring significance in

In its opinion below, the court of appeals

9/ (continued) the litigated district court and courts of appeal cases. Not surprisingly, the issue has received conflicting treatment in such cases -- a fact which was commented upon by this Court in both Noyd and Craycroft and urged by petitioner as one reason for granting certiorari here. See Petition for Writ of Certiorari at 15-18.

For example, the exhaustion of military judicial remedies prior to maintaining a civil action for habeas corpus was required in an early Tenth Circuit decision, which remains unique in its requirement that a discharge applicant must disobey orders and subject himself to military criminal jurisdiction before being permitted to seek civil habeas relief. Noyd v. McNamara, 378 F.2d 538 (10th Cir. 1967) aff'g 267 F. Supp. 701 (D. Colo. 1967). This position was subsequently disavowed by the United States Department of Justice on October 23, 1969 Dep't. of Justice Memo No. 652 [attached as an Appendix to the government's Brief in opposition to the Petition for Certiorari herein], however, the Noyd rule is apparently still urged by United States Attorneys within the Tenth Circuit. See, e.g., Polsky v. Wetherill, 438 F.2d 132 (10th Cir. 1971).

held that where an applicant for discharg

9/ (continued) Subsequent to Noyd, the Second Circuit in Hammond v. Lenfest, supra, refused to require exhaustion through court martial proceedings, as did various district courts, including the Northern District of California in Crane v. Hedrick, supra, and Gann v. Wilson, 289 F. Supp. 191 (N.D. Cal. 1968). See also Cooper v. Barker, supra; Talford v. Seaman, 306 F. Supp. 941 (D. Md. 1969). Both Crane and Gann were of course disapproved on this point in the decision of the Court of Appeals herein. The Fifth Circuit in In re Kelly, 401 F.2d 211 (5th Cir. 1968) refused to impose a blanket rule but held that in the case then before the court exhaustion of pending court martial proceedings would be required.

On the closely related question of exhaustion before military correction boards (such as the ABCMR) the courts have similarly divided. The Ninth Circuit has held that such exhaustion is required. Craycroft v. Ferrall, supra; compare also Bratcher v. McNamara, 415 F.2d 760 (9th Cir. 1969) and Krieger v. Terry, 413 F.2d 73 (9th Cir. 1969). However, the Fourth Circuit has explicitly rejected the Ninth Circuit rule and application to such Boards is not therein required. U. S. ex rel Brooks v. Clifford, 412 F.2d 1137 (4th Cir. 1969).

The Department of Justice has now disavowed Craycroft and adopted the Fourth Circuit view. Moreover,

from the military as a conscientious

9/ (continued) the appellate decision in Craycroft was vacated by this Court in March, 1970 since the Solicitor General had conceded that the petitioner had either exhausted the remedy in question or it was "nonexistent." (397 U.S. at 335). Nevertheless, the former Ninth Circuit rule apparently retains at least some life in that Circuit. (See the Court of Appeals opinion herein, 435 F.2d at 304). In this connection, it should be parenthetically noted that the Solicitor General's position in its Brief opposing certiorari in the instant proceeding (at page 6) -- that petitioner "voluntarily" elected to proceed before the ABCMR -- is directly contrary to the position which was taken by the local U. S. Attorney in proceedings before the District Court, and also contrary to the Court of Appeals' own statement that Parisi in petitioning to the ABCMR was "satisfying the administrative exhaustion requirement " of Craycroft. Parisi v. Davidson, 435 F.2d at 304 . In fact, as far as petitioner is aware, at least in the Northern District of California, the government still urges the courts to follow the Ninth Circuit decision in Craycroft in cases involving Army discharge claimants.

objector is (or becomes) subject to military court martial proceedings, a district court should stay the civil action pending not only military trial but appellate and post-conviction proceedings. Appendix at 63-64. The court's holding was purportedly based upon accepted notions requiring exhaustion of remedies prior to seeking judicial relief and the traditional reluctance of civilian courts to become unduly or precipitiously involved in military affairs. Orloff v. Willoughby, 345 U.S. 83 (1953); Noyd v. Bond, 395 U.S. 683 (1969). As pointed out by the Court of Appeals, however, 435 F.2d at 303, petitioner does not dispute "the wisdom [or the] correctness" of either of these principles. Rather, petitioner there maintained and now urges that, properly understood, such principles were not correctly

applied in the lower court and that the decision below extends the doctrine of exhaustion in an extraordinary and unprecedented manner. What is more, the unavoidable effect of such decision is substantially to close the doors of the federal courts to in-service conscientious objectors who have been wrongfully denied discharge by the military.

A. The Court Below Improperly Applied the Doctrine of Exhaustion of Remedies In This Case

As noted, petitioner does not dispute the important principle requiring exhaustion of remedies. He respectfully submits, however, that the court below fundamentally erred in failing to distinguish between exhaustion of procedures designed to provide the remedy sought (or which would be sought)

in habeas corpus proceedings -- here discharge as a conscientious objector -- and exhaustion of procedures (here court martial) not so designed, and in which such remedy is either unavailable or merely ancillary. Such a distinction, we submit, is not only fundamental to the doctrine of exhaustion but is readily applied on the facts now at bar.

As recently noted by this Court in McKart v. United States, 395 U.S. 185, 193 (1969), the doctrine of exhaustion cannot be assessed in a given case without "an understanding of its purposes and of the particular administrative scheme involved." See also, e.g., U.S. ex rel Brooks v. Clifford, 412 F.2d 1137, 1138 (4th Cir. 1969). Moreover, as spelled out by McKart and cases following, the exhaustion

requirement reflects concern for preservation of "the integrity and autonomy" of the reviewing agency or procedure. This principle in turn encompasses the interests in allowing creation of a full administrative record and the exercise of expertise by the administrative reviewing authority, particularly in matters calling for exercise of administrative discretion, in permitting administrative bodies, where possible, to correct their own errors and in avoiding unnecessary judicial decisions where successful prosecution of administrative remedies will supply the relief sought and thereby moot the controversy. See, e.g., McKart v. United States, supra, 345 U.S. at 194-95.

Viewed against this legal backdrop, the distinction urged by petitioner here is, we suggest, clear. In asserting his right to discharge

from the military as a conscientious objector, petitioner was required to, and did, follow the explicit requirements of Army Regulation 635-20. This included, as more fully described above, the filing of a detailed application form, the securing of various endorsements thereon (including an opinion from a military Hearing Officer knowledgeable in conscientious objector matters) and the submission of such application to the military authorities for review and determination.[10/] Although petitioner now contests the correctness of the Army's decision on the merits of such application (indeed, the assertion that its decision was without basis

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10/ Indeed petitioner even took the further step of seeking review by the ABCMR -- an administrative process still required in the Ninth Circuit under Craycroft v. Ferrall, 408 F.2d 587 (9th Cir. 1969) -- despite the Solicitor General's disavowal of the necessity of such further exhaustion.

in fact forms the predicate for the instant habeas corpus action out of which this petition arises), Parisi in no way disputes the propriety of the administrative application procedure.

Far different, however, is a claimed requirement of exhausting military judicial remedies through court martial and military appellate procedures. The function of a court martial is to consider charges of criminal violations of military law, and either to convict and sentence the defendant or to acquit him. Court martials are not convened to pass upon denial of conscientious objector applications, or to grant discharge to those whose applications have been wrongfully denied.

Nevertheless, the government has asserted and the courts below assumed that the court martial process provides an "available" remedy to the conscientious objector applicant solely because a serviceman may perhaps claim in defense to a charge of refusal to obey orders (as Parisi did here) that the order given was unlawful because of wrongful denial of the discharge application. But to suggest that this constitutes an "adequate" military remedy is untenable. In the first place, although the theoretical availability of such a defense was recognized in U.S. v. Noyd, 18 U.S.C.M.A. 483, 40 CMR 195 (1969), no reported military decision (including Noyd itself) has yet accepted such a defense, and subsequent decisions have questioned whether it could exist under any circumstances. See Lee v. Pearson, 18 U.S.C.M.A. 545, 40 CMR 257

(1969); U.S. v. Stewart, 20 U.S.C.M.A. 272, 43 CMR 112 (1971).[11] Moreover, even if the defense is available, it is entirely possible that the petitioner, either at the trial or at the appellate level could be acquitted not on that basis but on some other ground or defense. The effectiveness of such a defense is further diluted by the fact that successful appeals might not result in an acquittal but simply in a remand for a new trial.[12] Finally, and

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11/ As noted supra, in Parisi's court martial, the government urged and the military judge held, that the administrative denial should not be reviewed even on a limited "basis in fact" test applied by federal district courts; he went no further than to make a determination that the denial was not "arbitrary, capricious, or an abuse of discretion."

12/ In Parisi's military appeal for example, there are a number of assignments of error that are unrelated to the conscientious objection claim; thus the conviction might well be reversed and the case retried without obtaining a ruling on the conscientious objection claim.

of most significance, even successful assertion of the conscientious objection defense normally would entitle the defendant only to acquittal -- not the discharge being sought in the habeas corpus proceedings.

Notwithstanding these obstacles, the government has further asserted and the Court below implied that military relief might be available if petitioner would pursue yet a further post conviction remedy: a petition to the Court of Military Appeals for writ of habeas corpus discharging him from the Army. Such a "remedy" -- which would expand the required exhaustion even beyond the original scope of the

district court's order -- is assertedly based on the power of the Military Court under the All Writs Act, 20 U.S.C. § 1651(a)(2), to issue "all writs necessary or appropriate in aid of its jurisdiction." But the "jurisdiction" of the Court of Military Appeals does not extend to considering or granting servicemen's claims for discharge from the military as conscientious objectors. Rather, that "jurisdiction" is limited by the Uniform Court of Military Justice to appeals from court martial decisions and ordering that those decisions be affirmed or that the court martial charges be retried or dismissed. 10 U.S. Code § 867(e); U. S. v. Snyder, 18 U.S.C.M.A. 480, 40 CMR 192 (1969). To be sure, it has been held that in connection with court martial cases which are or could come before the Court of Military

Appeals, the All Writs Act permits that court to grant writs of habeas corpus pertaining to the nature of defendant's confinement within the military pending appeal from court martial conviction. See, e.g., Noyd v. Bond, 395 U.S. 683, 695 (1969), Levy v. Resor, 17 U.S.C.M.A., 135, 37 CMR 399 (1967). But not even the Court of Military Appeals itself has ever suggested that such jurisdiction includes the power to issue a writ of habeas corpus granting non-punitive separation from the military as a conscientious objector. 13/

13/ The instant case is sharply distinguishable from Noyd v. Bond, supra, which held it proper to require resort to the Court of Military Appeals to seek an emergency writ releasing petitioner from incarceration (but not from the military itself) pending appeal from court martial conviction -- but only after finding that the Court of Military Appeals in Levy v. Resor, supra, had directly "held that it would, in appropriate cases, grant the relief

Moreover, apart from the question of available relief, the Court of Military Appeals has expressly held that it will not review the question of the lawfulness of the order which a serviceman has been charged with disobeying -- including "constitutional" objections thereto -- in any kind of "emergency writ" proceeding,

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13/ (continued) petitioner now demands from us." 395 U.S. at 695. On the other hand, the government's assertion that Parisi should have been required to seek military habeas corpus discharging him from the Army is directly analogous to another claim which the Supreme Court in Noyd rejected -- i.e., a suggestion that petitioner there "should have requested the Air Force Board of Review to release him pending exhaustion of his rights of appeal." As to this claim, the court stated in language apposite here:

> "The Government, however, cites no decision of a Board of Review which asserts the power to grant emergency interlocutory relief prior to the Board's consideration of the case on the merits; nor are we referred to any statute which unequivocally grants this authority. In the absence of any attempt of the Board of

but will only do so "in the normal course of appellate review" -- i.e., after both trial by court martial and intermediate appellate proceedings have been exhausted. Font v. Seaman, 20 U.S.C.M.A. 387, 43 CMR 227 (1971). Thus, even were such a remedy theoretically available, its pursuit would require such a lengthy process as to be incompatible with the settled rule that a person need not exhaust remedies which would involve unreasonable delay. 13(a)/

Indeed, the Court of Appeals in this case did not directly find or hold that the Court of Military Appeals did have the power to grant

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13/ (continued)

Review to assert such a power we do not believe that petitioner may be properly required to exhaust a remedy which may not exist." (395 U.S. at 698, n.11, emphasis added

13(a)/ See authorities cited at n.17, infra

such a discharge. Rather, it merely stated "we are not now prepared to assume that, if it is determined that Parisi's application for discharge was denied without basis in fact, an error of such constitutional magnitude cannot be rectified by a reviewing court within the military system." (App. at 73-74) We submit that the court below seriously erred in adopting such an approach. Surely the party who seeks to impose an exhaustion remedy to prevent or suspend access to the federal court to test deprivation of constitutional rights should have the burden of demonstrating that the remedy it would require be exhausted is promptly and effectively available. Yet the Court of Appeals has lifted this burden and instead imposed on petitioner a burden of conclusively

disproving the availability of a remedy which is purely speculative.

Thus, the relief potentially available from the military judicial system is obviously inadequate to secure the relief sought by petitioner in the civil proceedings and to which he is unquestionably entitled if his discharge application was denied without basis in fact. Moreover, and in any event, the military judicial remedies have no relation whatever to the administrative processing of claims for conscientious objector discharge, which petitioner fully pursued and which formed the basis of his habeas corpus action now stayed by the court below. Indeed, requiring the exhaustion of such military judicial remedies would serve none of the basic purposes of administrative exhaustion noted above. Army courts martial and

appellate review bodies neither possess particular expertise respecting conscientious objector claims nor are they prepared to assist in the preparation of a more complete record for judicial review. Compare, e.g., Noyd v. Bond, supra, at 686, note 8 and U.S. ex rel Brooks v. Clifford, supra, at 1140. Moreover, even assuming courts martial will consider defenses based on claims of conscientious objection, such consideration is not a likely source for "correction" of prior administrative error, nor does it involve the exercise of discretion. At the very most, a Military Court would scrutinize such a previous administrative decision only with reference to the limited "basis in fact" test exercised by the civilian courts. This does not involve plenary review, nor administrative discretion or

expertise, but solely a question of law.

The decision below thus represents an unwarranted extension as well as an improper application of the traditional principles governing exhaustion of remedies. By contrast, the test which petitioner has here proposed would, we submit, uphold the integrity of the military administrative process while leaving open the doors of the civil courts to persons who have diligently pursued their applications for discharge through the requisite phases of administrative processing within the service. 14/

14/ The decided cases which have considered the question of "court martial exhaustion" to date, including the decision below, have apparently considered the "time" element of some significance to the question of whether exhaustion is, or should be, required. Three

B. The Court Below Should Not Have Deferred Review of Final Military Administrative Action to the Military Courts.

For similar reasons, deference to military jurisdiction is not properly

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14/ (continued) apparent categories have evolved. The first situation is presented where no military criminal proceedings are pending at either the time when the habeas petition is filed or when the stay is sought. Thus, the exhaustion claim is presented, as it were, as an absolute -- i.e., that the petitioner is required to commit a crime and face court martial charges before being permitted civilian review. This is the generally discredited view of Noyd v. McNamara, supra. Compare Hammond v. Lenfest, supra.

In the second instance, no charges are pending at the time the petition for habeas corpus is filed, but, during its pendency, a military crime is allegedly committed and a court martial is convened. This is essentially the situation before the courts here -- although the Ninth Circuit apparently construed the facts somewhat differently. See App, at 69-70.

Finally, there is the situation presented where the alleged crime is committed and charges are preferred prior to habeas corpus relief being sought.

required in the instant proceedings since

14/ (continued) This is seemingly the most common situation confronted by the courts, being presented in In Re Kelly, Cooper v. Barker, Talford v. Seaman, Gann v. Wilson and Crane v. Hedrick, all supra. As noted in footnote 9, these cases have resulted in conflicting holdings.

Petitioner submits that the relative time when military charges are levelled should not materially affect the exhaustion issue presented here. The considerations we advance in text would appear to apply with virtually equal strength whether the court martial charges are brought before habeas corpus is sought or while such action is pending. In both cases, as we discuss more fully in text hereafter, the pendency of military criminal proceedings is largely unrelated or random in relation to the serviceman's administrative right to discharge -- and to review of its denial for constitutional defect. But if any relevance is attached to the time distinction, Parisi's situation presents a stronger case for foregoing exhaustion than, e.g., Cooper or Kelly.

the considerations generally supporting such deference are heavily outweighed by the burdens that it would place upon discharge applicants such as petitioner. See, e.g., Hammond v. Lenfest, supra, at 714; U.S. ex rel Brooks v. Clifford, supra, at 1141. Like the requirement of exhaustion generally (as above discussed), deferral by federal courts to the military does not betoken a lack of subject matter jurisdiction in the civil courts but rather, their reluctance to become unduly involved in military affairs. Indeed, even those cases which have required exhaustion in related contexts have based their holdings not on any lack of jurisdiction to proceed but upon the ground that the proper interplay between civilian and military laws requires such deference

or abstention.[15] Compare, e.g., In Re Kelly, supra; Craycroft v. Ferrall, supra, and see the opinion below at footnote 5, and accompanying text (Appendix 64-65, 85-88).

15/ To the extent that the reluctance of the federal courts in such proceedings is based upon or is analogous to the doctrine of voluntary "abstention" consideration should be given to decisions such as Zwickler v. Koota, 389 U.S. 241 (1967), holding such principle applicable "only in narrowly limited 'special circumstances'" and unquestionably not in cases, as here, where the issue presented is one of compliance with constitutional due process standards by the military. Of similar import are cases, generally instituted under 28 U.S.C. § 1983, which have refused to require technical exhaustion in light of the important constitutional rights or liberties in issue. Compare, e.g., McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967); Houghton v. Sharfer, 392 U.S. 639 (1968). See also Dombrowski v. Pfister, 380 U.S. 479 (1965).

While petitioner again does not dispute the general principle of limited deference to military procedures or forums,[16] he would strenuously dispute the application of that principle in the case now at bar. Where, as here, fundamental claims of religious liberty and personal freedom are in issue, the federal judiciary should not

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16/ The concept, sometimes referred to as comity, under which one judicial system defers to another, is recognized by the Military Courts to require, under appropriate circumstances, that military courts defer to civilian courts. In U.S. v. Davidson, 30 CMR 921 (1961), involving a soldier who had been charged by military and civilian authorities with having committed a crime, the military court held that it must defer to the civilian court where the civilian court's jurisdiction first attached.

voluntarily stay its hand pending the remote possibility that a military court might at some point grant petitioner the relief sought (i.e., discharge from the Army as a conscientious objector) as an incident to reviewing his military criminal conviction. Such a requirement would unduly burden the basic right of access to the federal courts to test denial of constitutionally guaranteed due process. In such circumstances as the Fourt Circuit aptly pointed out in rejecting an analoguous exhaustion claim in U. S. ex rel Brooks v. Clifford, supra, it is not enough to find that relief might be theoretically available in some cases and that a modest saving in judicial time might be then effected. Rather, where such personal liberties are at stake, a court must "consider

whether this interest [in reducing the judicial caseload] outweigh[s] the burdens which may be imposed upon the petitioner by the constant and continuous delays in the final determination of his claim." Compare McKart v. U. S., supra, at 197.

Thus viewed, the court in Brooks held that proceedings before the ABCMR were not prerequisite to consideration of a conscientious objector's petition for habeas corpus:

> "If petitioner's claim of conscientious objection is well-founded (and we have decided that it is), petitioner, and others similarly situated, will be required to litigate administratively during a period in which each hour of each day they are required to engage in conduct inimical to their consciences or be subject to court martial, with the added risk that in the ordinary course of the operations of the military, they may be ordered to a duty even more offensive to them."
> (412 F.2d at 1141)

Compare also, e.g., Hammond v. Lenfest, supra, at 714.

As we have discussed above, to the extent that deference to military procedures is properly required in order to give the military ample opportunity to govern itself or to correct its own errors, that opportunity was provided when petitioner complied with the application and review procedures of A.R. 635-20 -- and certainly when he thereafter made application for review, by the ABCMR. When petitioner's applications were reviewed, and denied, by the military, the issue of his rights to discharge became ripe for review on habeas corpus since the administrative record was then complete, those persons within the military having supposed expertise

had been provided the opportunity to exercise it and there had been opportunity for correction of error in the ABCMR. At that point there was no basis for requiring petitioner to pursue the essentially unrelated remedies of the military judicial processes prior to obtaining civilian review of his administrative discharge claim.

The decisions of this Court in Gusik v. Schilder, 340 U.S. 128 (1950) and Noyd v. Bond, supra, do not affect the result urged here. In each of those cases -- as well as in the so-called "state habeas" cases from which these decisions derive -- the petitioners requested the civilian courts to intervene directly in pending military criminal proceedings and sought relief in the nature of "collateral attack" of the

precise type which the military forum was intended and able to provide. Thus, in both Gusik and Noyd, the habeas petitions filed related solely to the military prosecutions then in progress and did not give rise to, or involve, any independent claim for relief.

By contrast, the habeas corpus petition filed by Parisi relates solely to the denial of his administrative request for discharge as a conscientious objector. He has not and does not ask the federal courts for appellate review of or collateral attack upon the military prosecution against him, or for supervision of the administration of criminal justice in the military. Instead, having fully pursued the administrative process, he invokes the settled jurisdiction of the district court to decide whether the

military denial of his application for discharge as a conscientious objector was without basis in fact and hence a deprivation of his constitutional right of due process. If it was, he is entitled to a determination by the district court of his right to be discharged as a conscientious objector, and to the enforcement of that right through appropriate remedy in light of the facts of the case. This jurisdiction of the federal courts and right of the petitioner is entirely independent of the military criminal proceedings against him. The exercise of that jurisdiction to protect petitioner's constitutional rights surely offends no proper concept of the relationship between the judiciary and the military.

C. The Decision Below Improperly Denied Petitioner Access to The Federal Courts and Infringes The Basic Policies Underlying Exemption for Conscientious Objection

Requiring exhaustion of military judicial remedies on principles of comity or abstention is particularly inappropriate in light of the effect which such deferral would have upon the availability of the federal courts and the habeas corpus remedy itself to test unlawful denial of conscientious objector discharge. Petitioner respectfully submits that the exhaustion requirement imposed below would have the undeniable effect not simply of delaying such relief, but of totally depriving servicemen whose discharge claims have been wrongfully denied of access to the federal courts during virtually the full period of their military confinement.

Even granting the possibility that

military courts may have the power to grant discharge incident to review of criminal charges, the modest saving in judicial time thus effected cannot realistically be deemed sufficient to balance the detriment created by such requirement. Indeed, as this Court pointed out in McKart, supra, where a peril to liberty is in issue there must be "a governmental issue compelling enough to outweigh the severe burden placed upon petitioner" before exhaustion will be compelled (395 U.S. at 197). Although McKart approached the exhaustion question in the context of an asserted defense to criminal prosecution for failure to submit to induction, we think it clear that the Court spoke more broadly in its analysis of the exhaustion requirement -- a view which is shared by subsequent cases (e.g.,

U. S. ex rel Brooks v. Clifford, supra) and the leading commentators. Compare Davis, ADMINISTRATIVE LAW TREATISE, 1970 Supplement at 642-644.

The value of civilian review of military action, such as that challenged here, is no greater than the availability of reasonably prompt access to the courts. Thus, the mere fact that habeas corpus relief is theoretically available to petitioner at some future time after his military criminal proceedings have run their lengthy course is of little value to petitioner, or to persons similarly situate, particularly when weighed against the consequences to their personal liberty and conscience. Compare U. S. ex rel Brooks v. Clifford, supra, at 1141 (quoted supra, at 50) 17/

17/ In Brooks, the Court regarded the speed of habeas corpus actions (as compared to the average four-month

In these circumstances, petitioner would respectfully submit that the unconscionable delays which would be worked by requiring pursuit of military judicial remedies would unduly stifle pursuit of legal remedies without compensating benefit and would thus undermine the important purposes of allowing resort to the federal

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17/ ABCMR proceedings) as an independent basis for refusing to require exhaustion in that case. Indeed, undue delay has traditionally been a basis for bypassing resort to (or terminating) administrative proceedings. See, e.g., McNeese v. Board of Education, 373 U.S. 668 (1963); Jeffers v. Whittley, 309 F.2d 621 (4th Cir. 1962). Cf. Note, Judicial Acceleration of the Administrative Process: The Right to Relief from Unduly Protracted Proceedings, 72 YALE L.J. 574 (1963). Given not only the history of this case but the indisputable length of criminal trial and appellate proceedings generally, it is hard to dispute the pertinence of such principle here.

courts to redress violations of fundamental constitutional rights.

Finally, the lower court's decision is irreconcilable with the nature and purposes of the exemption from military service which is accorded to conscientious objectors. The rationale of that exemption is the congressional and administrative recognition that "there is a higher loyalty then loyalty to this country, loyalty to God," that an intense "moral dilemma" exists for "those who believe that they owe an obligation superior to that due the state of not participating in war in any form," and that "liberty of conscience" is so vital "that nothing short of self-preservation of the state should warrant its violation." U.S. v. Seeger, 380 U.S. 163, 170-172 (1965). As stated by D.O.D. 1300.6 "the congress . . . has deemed it more essential to respect

a man's religious beliefs than to force him to serve in the armed forces . . . ." Yet the exhaustion requirement now urged by the government would subvert this policy by imposing on conscientious objectors the very kind of moral dilemma which the exemption for conscientious objection was intended to prevent. For that requirement would force discharge applicants to face an unconscionable choice between firmly held religious beliefs and the right to have such beliefs tested in civil courts of law on a petition for habeas corpus.

This result is sharply illustrated by Parisi's own case. While Parisi's application for discharge was pending and prior to its denial by the Secretary of the Army, respect for his conscientious scruples was given protection by an Army

regulation providing, in pertinent part, "an individual who applies for discharge based on conscientious objection will be retained in his unit and assigned to duties providing the minimum practicable conflict with his asserted beliefs pending a final decision on his application."[18] But as soon as Parisi's application had been denied by the Secretary of the Army (notwithstanding its uniform endorsement by all who interviewed Parisi) the Army (1) took the position that under Craycroft v. Ferrall, supra, petitioner must appeal to the ABCMR before seeking relief on habeas corpus, (2) withdrew the protective provisions of its regulations

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18/ A.R. 635-20, Par. 6(a).

and (3) issued orders transferring petitioner to duty in Viet Nam and persisted in those orders notwithstanding pending petitions both to the ABCMR and the federal district court -- orders which, at least for Parisi, would compel violation of his religious beliefs.[19/]

19/ It is true that a court (as the district court herein) may have disagreed with a serviceman's claim that such an order has materially increased the conflict with his religious beliefs and thus refused to temporarily restrain such orders. But that does not detract from the sincerity of the individual's own beliefs. As the Supreme Court has reminded us in U. S. v. Seeger, supra, a man's religious beliefs in relation to military service involve "an intensely personal area" in which one individual's beliefs may be "incomprehensible to others," yet the "validity of what he believes cannot be questioned." 380 U.S. at 184-85.

Had Parisi been willing to accept the Army's commands in spite of their violence to his conscientious scruples, he would have been permitted to pursue his petition for habeas corpus. Yet because of the strength of his beliefs he was unwilling to compromise the dictates of his conscience or his beliefs to conform with military orders which surely had the effect (if not the intent) of escalating the relationship between his military duties and combat activities. As a result, he is now indefinitely denied civil relief which would be available to those servicemen who are willing to compromise rather than remain faithful to their beliefs as they see them.

Thus ironically the effect of the lower court's decision in this case is to bar civilian habeas corpus review to conscientious objectors whose beliefs are most strongly and sincerely held. A military denial of an application for discharge as a conscientious objector might be totally without basis in fact and thus a clear violation of constituional right. Yet under the decision below, military commanders, simply by issuing subsequent orders conflicting with the claimant's religious beliefs, can effectively or seriously impair his right to apply to the federal courts to test the validity of and secure relief from the military

refusal to recognize his claim of conscience.[20/]

Such a result strikes at the heart of the exemption from military service based on religious belief. It is, after all, axiomatic that for the true and sincere conscientious objector, orders compelling performance of

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20/ This is not to suggest or presume bad faith on the part of the military. It is simply to affirm that the power of military officials, whatever their intentions, to issue orders and initiate court martial proceedings against conscientious objector applicants should not be allowed to thwart such applicants' rights to invoke the jurisdiction of the federal court to test the wrongfulness of denial of discharge applications.

regular military duties -- particularly in a combat zone -- create intense, indeed incompatible conflict with religious faith. It is the very essence of conscientious objection to resolve that conflict by remaining loyal to the "obligation superior to that due the state." U. S. v. Seeger, supra. 21/

21/ Indeed the regulations providing for discharge of in-service conscientious objectors, D.O.D. 1300.6, Par. VI, D.3., and A.R. 635-20, Par. 4.a(4)(b), implicitly recognize that refusal to obey military orders is an essential part of the conscientious objection which is a ground for discharge. Both regulations cite 38 U.S. Code § 3103's provision that "the discharge of any [member of the armed forces] on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authorities . . . shall bar all rights of such person under laws administered by the Veterans Administration . . . ." (emphasis supplied) and require that the conscientious objector applicant be advised of the provisions of that section.

To hold that a conscientious objector who thus refuses orders because of his religious beliefs thereby forfeits prompt access to the federal courts to test the constitutionality of the rejection of his discharge application is to deny the respect for religious beliefs and liberty of conscience which underly the conscientious objector exemption. Such a result, we submit, is neither required nor justified by the exhaustion principles so tenuously asserted in the case at bar.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests this court to reverse the

decision of the Ninth Circuit Court of Appeals and to remand this action to the district court for proceedings on the merits.

Dated at San Francisco, California, this 14th day of July, 1971.

Respectfully submitted,

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